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June 27, 2016

The Honorable Joel H. Slomsky
United States District Court
Eastern District of Pennsylvania

Re: **U.S. v. Yu Xue, et al.**
16-CR-22
Response to June 17, 2016
Conference Call

Dear Judge Slomsky:

On June 17, 2016, the Court held a conference call with the parties to discuss the parameters of the discovery protective order in the above referenced case. The purpose of the protective order is to secure the voluminous amount of trade secret and otherwise confidential materials which the government intends to provide in discovery. In an attempt to mediate the parties' dispute over the parameters of the proposed order, the Court offered two suggestions for the parties to contemplate. The government requested, and the Court permitted, the government to consider the Court's suggestions and respond in writing. After considering the Court's suggestions, the government responds as follows.

The Court's first suggestion concerned the feasibility of hiring an attorney to take the confidential discovery materials to the defendants' homes. The obvious purpose of the Court's suggestion was to address the primary concerns of the parties. The government's primary concern is that the confidential discovery materials be appropriately safeguarded, not only from further theft or malfeasance by the defendants, but also by theft or malfeasance by third parties. The defendants' primary concern appears to be fashioning an order which allows the defendants to review the voluminous discovery in the convenience of their own home, rather than having to spend considerable time and expense to travel somewhere else to review these discovery materials.

Unfortunately, the government does not believe that the Court's suggestion of hiring an attorney to take the discovery materials to the defendants' homes is a practical solution to the problem for ethical,[1] logistical, and practical reasons. First and foremost, there does not appear to be any funds to pay for these attorneys. The Justice Department does not have funds to pay for additional lawyers for the defendants. Furthermore, employing an attorney would not seem

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1 See, e.g., 204 Pa. Code Rule 4.2 (prohibiting lawyers from communicating with represented parties).

to meet the custodial and security objectives here at issue. Attorneys are trained in law, not security. An attorney otherwise not involved in this matter is simply an inappropriate custodian for this highly valuable material.

That said, the government does believe that with a slight modification, the Court's plan can address all of the parties' concerns. Rather than hiring an attorney, the government proposes that private security firms be retained to take the confidential discovery material to the defendants' homes. The main victim in this case, GSK, has indicated to the government that, under certain circumstances, GSK may be willing to retain the security firms and pay those expenses in order to safeguard its highly valuable property. Security guards, unlike attorneys, are properly trained for this kind of work, and also have the advantage of a less expensive hourly rate.

Under the government's plan, the FBI would load all the confidential discovery materials onto one encrypted laptop for each defendant. A security guard would retrieve the laptop from the FBI and take it to the defendant's home. The defendant could review the discovery material in the presence of the security guard. For example, the defendant and the security guard could both be seated around a dining room table. The security guard could sit across from the defendant in order to ensure that the defendant follows the appropriate security protocols set by the Court (no pictures, no downloading etc…) without the security guard seeing the computer screen and intruding on the defendant's trial preparation activities. At the end of the session, the security guard would then depart with the laptop. The defendants could schedule as many sessions as needed to review the discovery materials.

One of the main advantages of this proposal is flexibility. Security guards are accustomed to working nights and weekends, which defense counsel has suggested would be necessary for the review. The defendants could schedule sessions to view the discovery when it is most convenient for them to do so. Security firms typically employ many security guards and a security firm should be able to accommodate any session request. In sum, the government believes that this modification to the Court's plan would address both parties' primary concerns.

The government presented this compromise agreement to the defendants for consideration. The defendants indicated, through counsel, that such a proposal was not acceptable to them. The defendants appear to maintain that they want unsupervised access to the discovery in their own homes, which, in the government's view, is tantamount to having no protective order whatsoever. This type of unfettered and unsupervised access to this highly valuable material is completely unacceptable. As the government indicated at the last hearing, there is no kind remote monitoring system which will allow the government to adequately safeguard the confidential discovery in the absence of in-person monitoring.

If the defendants are unwilling to have security guards come to their homes with the discovery materials, the government's offer to arrange discovery viewing sessions at FBI offices near the defendants' homes remains an option. This is an equally viable proposal which will allow the defendants ample opportunity to view the confidential discovery materials. The government notes that it does believe that any of the four defendants are currently employed and they should have adequate time during the day when their children are in school to view the discovery. Moreover, defense counsel will have full access to the discovery material in their offices, and the defendants will remain free to review the discovery material in their lawyers' offices.

The Court's second suggestion was to employ a Special Master to assist the Court in fashioning an appropriate protective order. The government is not aware of any impediment to such a proposal. According to the Federal Judicial Center's handbook on "Appointing Special Masters and Other Judicial Adjuncts," the district court is empowered to appoint a Special Master in criminal cases to assist the Court in a variety of ways, including assisting with discovery and protective orders. The government does note that in this district each District Court Judge is assigned a Magistrate Judge to assist them with discovery matters. District Court Judges routinely refer these kinds of matters to the Magistrate Judge for a report and recommendation. Referring the matter to the Court's assigned Magistrate Judge is another option at the Court's disposal.

For these reasons, the government believes that it has proposed two viable options for the Court. Both options properly safeguard the highly valuable intellectual property while simultaneously providing the defendants ample opportunity to review it and prepare for trial.

Respectfully Submitted,

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